



REAL ESTATE LAW & INDUSTRY



REPORT

Reproduced with permission from Real Estate Law & Industry Report, 3 REAL 562, 09/10/2010. Copyright © 2010 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

REAL ESTATE PRACTICES

Lawyers who handle major transactions for sophisticated real estate players typically practice in large firms, sometimes moving from firm to firm. Joshua Stein, one of the country's leading commercial real estate lawyers and an editorial board member of this publication, took the road less traveled. On Aug. 1, he left a global megafirm to establish his own practice, Joshua Stein PLLC, in an 1,100 square foot suite on East 54th Street in Manhattan. He recently took a break from unpacking boxes and setting up his new office to speak with BNA's Richard Cowden about his reasons for going it alone and his outlook on practicing real estate law in a time when the industry struggles to recover from a major downturn.

Living Dangerously: Veteran New York Real Estate Lawyer Strikes Out on His Own

BNA: Your decision to set up your own firms has surprised a lot of people. What motivated it and why do you think anyone would want to hire you for a substantial legal matter?



Joshua Stein

Stein: I wanted more freedom and flexibility, and a simpler relationship with clients. My early sense, a week or two into my new adventure, is that I'm going to find and enjoy that freedom and flexibility. This way of practicing law feels right to me.

Today's clients are, I think, more open minded than 10 or 20 years ago when it comes to hiring someone who practices independently. More now

than in the past, many clients are interested in hiring the right lawyer, less concerned about the brand name of the law firm. Some large institutional clients do centralize their work with a handful of large firms, but plenty of real estate players want to use someone like me, a leading lawyer with an established name and reputation, without the need for a large firm.

Technology makes it relatively easy to handle substantial projects and big documents, and I've been a pioneer in using computers since 1982. It's true I can't instantly throw together a team of associates to work all night on a project, but most commercial real estate transactions don't get staffed that way. Except for the very largest projects, it's usually just a couple of lawyers working together, even in the large firms. I'm quite

confident I can deliver equivalent service in my new practice. And if I need an environmental or tax specialist, I know exactly who to call.

I have a strong and growing referral base for commercial real estate work in New York and nationally, as well as for what I call “special projects”—expert testimony, receiverships, arbitration, consulting for special problems, and the like. I’m getting a decent number of calls already. I expect to be busy.

BNA: Isn’t this a uniquely awful moment for a commercial real estate lawyer to go out on his own?

Stein: Actually, now is a great time to hang a shingle as the market steadies itself. Times of stress are times of change. Once the market recovers—and it will—I will be quite well positioned. To some degree, people are rethinking how they do business. And I get the sense that pressure is building in real estate, with an impending increase in transactions—not necessarily all pleasant or happy or nice for everyone—in the near term. I plan to be at the center of that.

Simplicity and Independence. **BNA:** Did you consider bringing on just one or two partners and creating a small firm?

Stein: I want simplicity and independence. I have a lot of ideas about how to do legal work and serve clients. Other lawyers may not always agree with me. Partnerships, especially among lawyers, are all about differences of opinion. Yes, those differences sometimes lead to better decisions, but I’m pretty comfortable with my knowledge of this business and my abilities to serve commercial real estate clients. And I’ve always urged real estate clients to avoid having partners when possible. I’m following my own advice.

BNA: Do you have any staff?

Stein: I have several high quality junior real estate attorneys with at least three years of experience ready to begin as soon as the need arises.

I have a virtual assistant, based near Redmond, Wash., working on an hourly basis. We’ve spoken only once—when I interviewed her. We communicate entirely by e-mail and by scanning any work to be done and storing it in a designated folder on my network. My assistant has complete secure access to my file server, calendar, contacts, and documents. The three-hour time difference actually helps. It doesn’t create a problem at all.

BNA: What worries you most about starting your own practice?

Stein: The first thing is making sure I have clients. This does tend to be the number one worry for almost every entrepreneur in every business.

Early indicators look good. Three great clients have followed me already—two long-term and one relatively new. I’m quite pleased with the volume of calls and nibbles from the real estate community. But I still worry. Ask me in a year if I have enough clients.

Large Firm Quality in a Smaller Package. The second thing is setting the right hourly billing rate. I’m not looking to offer “bargain legal services.” Regardless of the rate I quote, someone will always work for less. Clients who just shop for price may choose to go there; that’s fine. My rate is meaningfully lower than comparable attorneys at large firms, up to 25 percent or 30 percent less, but still reflects my track record and knowledge. My fundamental business proposition consists of delivering large firm quality, sophistication, ex-

perience, and service—provided by a widely recognized, leading commercial real estate lawyer—at a rate significantly lower than “large firm” rates, but not bargain basement.

Third, I just want to ensure that everything works. I’ve tried to do everything right and in a reasonably careful and advanced way, but will it all work when I actually start having calls with clients and producing real documents?

BNA: You’ve said you began taking advantage of computer technology 10 years or so before the rest of the legal profession. Do I take it you plan to call on those capabilities to help you compete against larger firms?

Through 2007, we all forgot that markets go down as well as up. And now we’re kind of forgetting that markets go up as well as down. And first they also stabilize. We are starting to see signs of that.

Stein: I’ve specified and installed a computer system in my office that rivals what’s available to lawyers at any technologically advanced law firm. My network includes a main file server, backup systems, multiple scanners and laser printers, a multi-line VoIP [voice over internet protocol] telephone system with an automated attendant, Cat 6 wired network outlets throughout my space, and two secure Wi-Fi networks. My Wi-Fi networks will, among other things, let me work outside—in the public plaza at Lever House—when the weather is nice, though obviously one must protect one’s work from prying eyes. And I have four monitors on my desk.

To further support my paperless office, I’m using an online document management system, NetDocuments, to track, edit, and review my pending documents. NetDocuments provides secure access to documents—both for me and for my clients—from any web browser. This minimizes e-mail attachments and prevents chaos.

With these systems, I can handle the documents for transactions of any size and complexity, except perhaps transactions with dozens of sites, not work I seek in any case.

In my conference room, I have a 46 inch flat panel video monitor. When we negotiate a document, particularly a lease, I can display the document for the group as I edit it. Other people can follow along, either in person or through a web browser anywhere. Although it can be a challenge to write, edit, think, and negotiate all at once, as well as solve the occasional computer problem, I’m comfortable doing it and clients like it. You can save a couple of iterations of documents this way and hence some time and money too.

Flexible Arrangements. **BNA:** We hear a lot about real estate players trying to reduce legal fees. Beyond offering lower rates, what else can you offer?

Stein: First, we don’t charge for “disbursements”—messengers, phone calls, staff meals, scanning, word

processing, and the rest. I've simply eliminated these nuisance items and will treat them as overhead. Given the ever-increasing use of e-mail, "disbursements" have been steadily dropping anyway. They're not worth the trouble.

And I'm open to billing arrangements other than the billable hour. I plan to experiment with a fixed fee structure for particular services or deals; monthly retainers for steadier types of work or, say, all leases of up to a certain size; success fees; and the like. Alternative billing isn't just another word for discounts. It's more a way to give clients predictability and certainty. Clients care about that almost as much as the actual dollar amount of the bill. Clients don't want surprises. That's a fundamental principle of real estate deals and it also applies to legal fees.

I also have a lot of ideas that can help my clients use lawyers—me or anyone else—more cost-effectively. With two decades of notes on this subject, I could write a book about it, and just might at some point. For now, my ideas will remain top secret information for the exclusive benefit of my clients.

BNA: Many real estate practices have been under pressure from the downturn in real estate. But your work has focused in large part on distressed loans, the subject of your new book, *A Guide to Troubled Commercial Real Estate Loans for Lenders and Borrowers*. Does that mean that you may be able to attract more business at a time when the sector itself is in a slump?

Stein: Distressed loans are one of several areas I handle. Certainly that's a targeted area and one where I'm receiving phone calls. But I can't say it's my only or main focus. Yes, the commercial real estate industry generally is in a lot of distress now, though less so in Manhattan. My strategy is more to rely on my broad network and my reputation to get my share of the work that's out there, and it's going to include some distressed loan work. But it's not the only or even main focus. There is other work out there too, and I am doing some of it.

BNA: We are beginning to see signs that vacancy rates are beginning to stabilize, as are other fundamentals such as price. Do you expect to see a turnaround in the near future for commercial real estate, and how would that affect your practice?

Stein: Through 2007, we all forgot that markets go down as well as up. And now we're kind of forgetting that markets go up as well as down. And first they also stabilize. We are starting to see signs of that. But I'm not convinced the stabilization is real yet or that the market is going to stay stable. I'm still concerned about a lot of areas of the country and a lot of property types where there is still just a lot of vacant space, and that isn't good. Finally, in at least one major category of lending, multifamily, if you look behind who's really doing the very limited lending we see, it's really just the federal government in the form of Fannie Mae and Freddie Mac. You can pretend these are bona fide lenders, but each one is a bottomless federal expenditure at this point, hardly a sign of genuine private sector confidence in the market. We're all learning that the preservation of values in certain parts of the real estate market is nothing more than a very expensive federal program.

Signs of Recovery. On the other hand, space is being taken up. People are signing leases and even expanding. People are talking about doing transactions. There's a little bit of financing out there, not all from Fannie and Freddie. So, perhaps the market is starting to self-correct. The market is a very miraculous thing.

I don't think commercial real estate is going to go much lower, but I don't say that with huge confidence. I think there is a chance of another big hit, but it's not that likely. There are still a lot of numbers between today's values and zero. I certainly don't expect a near-term spike or dramatic increases in rents or values or dramatic decreases in vacancy rates. I think it's going to be a slow slog. We quite overdid things through 2007. The recovery and the turnaround will take some time.

We really have nowhere to go but up at this point, probably, and that should be quite good for commercial real estate lawyers in all different practice environments.

BNA: You have written or spoken in the past about possible changes in the structure of real estate ownership and finance. Are you in a position to help clients on all sides of a transaction look at alternative approaches that may not be common today?

Today we have an oversupply of unemployed real estate attorneys. As the real estate market changes, so will the market for real estate lawyers. Unemployed lawyers are finding homes.

Stein: That's part of what a good real estate lawyer or transactional lawyer does. You look at what the client needs—the goals they want to achieve. There are established structures that you typically use to meet those goals, but if those structures don't work, you can sometimes come up with some other way of doing it. What else can we do that meets the parties' needs, even if it's a little bit different? But, even though I can identify ways the ownership and management of real estate could change, I'm not at all convinced any of that is going to happen. I think we'll go back to business as usual. That's what happened in past cycles.

BNA: You have identified some interesting developments in the way the courts are enforcing property contracts. What do you see as the most important trends in this regard?

Stein: There are conflicting trends, really. One trend is that of just enforcing the document as written, and there is some of that, particularly for guarantees. Basically the court says your document represents an allocation of risks, and when you signed it, you didn't know how things were going to turn out. But you agreed that if X happens, then the risk gets allocated this way. And if Y happens, the risk gets allocated that way. And then it's up to the judge to ask what happened. If X happened, well then that's the allocation of risk and you just enforce it. That's one trend.

But there's another trend, which is well under way in residential foreclosures and starting to show up in commercial disputes. The courts are striving mightily to protect residential borrowers in any way they can be-

cause they think it's a good thing to "keep people in their houses." They're looking at what the lender did, and if they don't like it then they figure out a way to punish the lender, often—in my opinion—going beyond what the law justifies.

Some of that mindset is starting to carry over into commercial financing cases where the courts are basically saying, "I think this lender is a bad guy and I don't like this loan and I'm going to figure out a way to throw the book at the lender." If this trend grows, then I think lenders are going to start to have serious questions about the reliability of the courts and whether loan documents are, as a practical matter, capable of being enforced. Those questions could cast a pall over any possible increase in lending.

Another trend in litigation about defaulted loans is the simple fact that there is so little litigation about defaulted loans. That's important. Lenders are for the most part working with borrowers, extending, amending, pretending, waiting, praying, and not feeling under great pressure to go out and play hardball. That's maybe a somewhat surprising trend—and it's great for borrowers and the capitalization of banks. But it just might produce a good outcome at the end of the day if everyone can wait things out until markets improve. It just might all work out. But if it doesn't, then the moment of truth will be more painful than it would otherwise have been.

Market for Real Estate Lawyers. BNA: Would you advise a law student who is interested in property law to pursue a real estate practice, or do you think the field is going to have an oversupply of unemployed attorneys for some time?

Stein: Today we have an oversupply of unemployed real estate attorneys. As the real estate market changes, so will the market for real estate lawyers. Unemployed lawyers are finding homes. It's not quick; it's not easy; it's very much not painless. When the market booms again, and it will, there will be a lot of demand for real estate lawyers. There was huge demand for real estate lawyers in 2006 and 2007. Large firms were constantly fighting to keep their real estate associates during that time. Markets go up and markets go down. I think I mentioned that already. But one asset class will always be here, and that's real estate. The dot com business may come and go; forms of entertainment may boom and die; transportation may change; energy may change. But there will always be land and buildings and development.

I would tell a law student graduating this week that they should probably target some area other than real

estate law. But if they're just starting law school, then by the time they finish, we will probably be in another real estate boom. Even if we're just in the early stages of that boom, the opportunities should be good. And I would also point out that very few people are going into this practice area right now, so in a couple of years you can reasonably expect a shortage as soon as the market starts to improve.

BNA: Do you plan to keep writing and speaking?

Stein: Yes. I like doing it. You already know about my book on distressed loans coming out soon. I have about a half dozen articles in various stages of completion, and a few speaking engagements coming up. I'll be talking to a group of hotel owners about dealing with financing problems; chairing a panel on exit strategies for a New York state bar advanced leasing program; and then putting together a couple more educational programs for the Mortgage Bankers Association of New York and my annual Practising Law Institute seminar on commercial real estate financing. I'm thinking of arranging my own formal continuing legal education programs as well, depending on whether I see any interest in the marketplace. But that's tomorrow's project, or maybe the next day's.

Your Own Boss. BNA: Circling back to your practice, is setting up your own firm something you've wanted to do for years?

Stein: I have always wanted to be my own boss. I never really expected to be at a large firm as long as I was. I've always been looking out on the horizon and thinking about other opportunities, more flexibility, more independence. But there are certain things about a large law firm that are very nice. You don't have to worry about wastebaskets and paper towels, or making sure that the electric company gets paid. When you have your own shop you have to do everything. I've set up computer systems, repaired scanners, designed window treatments, figured out how to print labels (by the way, it's not so hard to do), moved and emptied boxes, and bought file folders. Other people do all that stuff for you in a large firm.

BNA: Is it a little scary?

Stein: Quite scary. But I know what I'm getting into. And I'm pretty good at this stuff, both the art and science of serving commercial real estate clients and the mechanics of dealing with computers and otherwise running an office. The big issue is whether I'll have clients, and it looks like I will.

BNA: That's always a good way to start.

Stein: It's a good way to start. I billed time my first day.